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No. 298

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BRIAN BARKER MALE, PETITIONER

*v.*

STATE OF FLORIDA, RESPONDENT

*RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA*

## BRIEF FOR THE STATE OF FLORIDA

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## BRIEF FOR THE STATE OF FLORIDA

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### OPINION BELOW

The order of the Supreme Court of Florida denying petition for writ of certiorari bearing date February 8, 1967 is attached hereto as Exhibit A. The opinion of the District Court of Appeals, Third District of Florida, which petitioner sought to have the Supreme Court of Florida review on certiorari is reported at 189 So.2d 521.

### JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, Section 1257(3) or under any other provision at least for purposes of determining whether to decline an assumption thereof.

## QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN ADMITTING AN INCRIMINATING STATEMENT MADE BY THE PETITIONER TO ARRESTING OFFICERS WHICH WAS OBTAINED WITHOUT THE BENEFIT OR PRESENCE OF COUNSEL, BUT BEFORE ACCUSATORY STAGE?

## STATEMENT OF THE FACTS

Despite the fact that the resumé of the facts allegedly supported by the record in this case leaves room for differences of interpretation and does not actually contain all the pertinent evidence found therein, respondent will accept it as set out by petitioner in his brief on pages 3, 4, and 5 thereof.

## ARGUMENT

The petitioner contends that the facts of his case are close to or identical with the facts in *Escobedo* v. *Illinois*, 378 U. S. 478. The record reflects otherwise.

Initially *Massiah* v. *United States*, 377 U. S. 201, is not persuasive, since it is (1) a federal exclusionary rule and (2) the petitioner had been informed against for the alleged criminal act.

The facts gleaned from the record establish that the petitioner was arrested and taken down to police headquarters (Tr. 44). At that time, the arresting officers advised petitioner of his right to remain silent and his right to counsel. No information or indictment had been filed against him at this point. His rights

were offered prior to the interrogation by the police officer (Tr. 45). These factors differentiate this case from *Escobedo*. Then petitioner called his attorney (Tr. 45) who arrived after the incriminating statements were made (Tr. 47). Petitioner admitted the abortion took place and that he did it. (Tr. 46)

The main thrust of petitioner's argument is directed to the fact that although counsel was offered and contacted, no interrogation of him should have been made and that any statement made by him as a result of the interrogation is inadmissible.

The Supreme Court of Florida in *Montgomery* v. *State*, 176 So.2d 333, held that *Escobedo* is limited to its facts, and where facts are distinguishable, *Escobedo* will not be controlling. The District Court of Appeal, Third District of Florida, in *McCumber* v. *State*, 182 So.2d 627, held that where the accused is advised of his right to counsel, and where the accused does not request the presence of his attorney at an interrogation, and where the record affirmatively shows that the statements made by an accused were given freely and voluntarily, there is no violation of constitutional rights.

The trial court found that the statement was voluntarily made (Tr. 49). Respondent contends that all the elemental factors in *McCumber* are present in this case.

Since the case sub judice was tried on June 21, 1965, the decision of this Court in *Miranda* v. *Arizona*, 384 U. S. 436, has no effect thereon. However, even in *Miranda*, this Court did not purport to find all confessions inadmissible. This Court recognized, as it has many times in the past, that any statement given freely and voluntarily without any compelling influence is admissible in evidence.

In the case of *Watts* v. *State of Indiana*, 338 U. S. 49, this Court held that an appellate court may upset a determination of voluntariness by a trial judge or jury only if facts which are unquestioned in the prosecution version of the case persuade the court that the confession was not voluntary. And if the defense version of a factual situation differs from the prosecution version (this has been known to happen), the trial judge's resolution of the conflicting testimony cannot be reviewed. *Application of Tune*, (3rd Cir. 1956) 230 F.2d 883; *Brown* v. *United States*, (10th Cir. 1966) 356 F.2d 230.

It appears that petitioner is under the erroneous impression that none of his incriminating statements were made until after he had called his attorney. Petitioner contends that after having called his attorney, the police officers should have refrained from interrogating him. However, the record clearly shows that petitioner had admitted his guilt before ever having requested permission to call his attorney and being allowed to do so. Beginning on page 44 of the transcript of record, the following is noted:

"Q And prior to taking any statements or admissions from him, what, if anything, did you do or advise him of?

A I advised him once again that he was under arrest, and if he talked about any aspect of this case that he would have to do so freely and voluntarily, and I also advised him that he was entitled to call a lawyer, which he did.

Q And after advising him of this, did he make any statements to you?

A He admitted that—

Q Don't tell me what he did. Tell me yes or no.

A Yes."

* * * *

"Q All right. What did the defendant say to you, and what did you say to him?

A I asked him if he was responsible and if he was in fact the person that committed this, this abortion, and he said he was, but he would rather not make any formal statements until he had consulted with an attorney, and any other questions that I asked him pertaining to certain aspects of the case he said he would rather wait until he consulted the attorney.

Q So, in fact, all he told you was that he was the person that did it, but he refused to go into any detail?

A Yes, sir."

(Transcript of Record on Appeal, pages 44, 45 and 46)

Respondent says that petitioner freely and voluntarily after having been warned of his constitutional rights by the police officer, made the incriminating statements of which he now complains. He now seeks to obviate the harm by saying that he should be relieved from the effect thereof because he called his attorney. But the harm had already been done before petitioner was allowed to telephone his attorney. He had admitted his guilt to the police officer! Respondent says that the existence of the right to counsel during the accusatory process does not constitutionally block an accused from acting or speaking voluntarily. *Thompson* v. *Cox*, (C.A.N.M. 1965) 352 F.2d 488; *Schultz* v. *United States*, (10th Cir. 1965), 351 F.2d 287.

## CONCLUSION

Based upon the aforesaid, it conclusively appears that the petition for writ of certiorari requesting this Court's intercession should be denied.

Respectfully submitted,

EARL FAIRCLOTH
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State of Florida

WALLACE E. ALLBRITTON
Assistant Attorney General
State of Florida

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The Capitol
Tallahassee, Florida

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1967

WEDNESDAY, FEBRUARY 8, 1967

BRIAN BARKER MALE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 35,865

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date July 19, 1966, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

CC: Hon. W. P. Carter
Hon. J. P. McCracken
Hon. Edward C. Vining, Jr.; Hon. Jack H. Baklo
Hon. Wallace E. Allbritton

Exhibit A